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No. 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

ASSOCIATION OF WESTINGHOUSE SALARIED EMPLOYEES
Petitioner

v.

WESTINGHOUSE ELECTRIC CORPORATION

PETITION FOR REHEARING

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Association of Westinghouse Salaried Employees, petitioner herein, respectfully petitions this Court for a rehearing in this case. As stated in the opinion of Mr. Justice Frankfurter, certiorari was originally granted here "for consideration of a section of the Taft-Hartley Act which has proved a fertile source of difficulty for the lower federal courts." We respectfully suggest that the opinions filed in this case on March 28, 1955, have not resolved any of these difficulties. Indeed, the absence of an opinion of the court and the contradictory construction given to the section within the three opinions of the six justices who voted for affirmance have enlarged rather than diminished the area of uncertainty in the application of the statute.

Such a result is, perhaps, at least partly inevitable where no single construction of a disputed statute can command

the support of five justices. There are, however, substantial reasons for urging that, in this particular case, reargument may lead to at least some measure of clarification of the issues. Summarily stated, these reasons are as follows:

(1) The constitutional problems which, in the opinion of three justices, require the construction reached by them, were not briefed or argued by counsel. It would seem proper to order reargument so that these as yet unargued constitutional issues may be fully explored.

(2) The opinion of Mr. Justice Frankfurter, which was joined by Mr. Justice Burton and Mr. Justice Minton, is itself unclear. It contains two separate, and contradictory, constructions of the statute. One construction—that Section 301 is to be read as giving procedural directions to the Federal Courts, rather than as a grant of jurisdiction—would invalidate almost every decision heretofore rendered by the lower federal courts under Section 301. The other construction—that Section 301 is a grant of jurisdiction but not over suits by unions where the compensation of employees is involved—would only invalidate half of the decisions of the lower federal courts, but itself contradicts the very premise and argument upon which the opinion rests. Reargument would provide an opportunity to clarify these uncertainties.

(3) The opinion of the Chief Justice, which was joined by Mr. Justice Clark (as well as, perhaps, the opinion of Mr. Justice Reed) overlooks one aspect of the relief sought by the union in this case. Even if, contrary to our prior contentions, the statute is to be construed in the manner indicated in those opinions, the judgment below should be reversed, not affirmed. The cause should be remanded for consideration by the court below of the union's request for relief on *its* (not the employees') contract.

(4) When this case was argued, counsel for both sides accepted the view of the court below that federal law governed as to the nature of the substantive rights created by a collective agreement. Hence the law of Pennsylvania on this question was not presented by either counsel to the Court. It now appears, however, that in the view of four (or perhaps more) justices of this Court state law is relevant in suits brought under Section 301. If this is so, it is relevant to show, as we believe it can be shown, that under Pennsylvania law a union has an enforceable substantive interest in the performance of *all* of the provisions of the collective bargaining agreement which it has negotiated. At the very least, counsel should be permitted to argue as to whether the cause should be remanded to the Court of Appeals to permit that Court to make a determination as to state law.

(5) The fact that a full Court will be able to participate on reargument increases the possibility that, on such reargument, some clarification of the construction of Section 301 by this Court will be achieved.

Each of these five grounds is more fully set forth below.

1. *The Constitutional Issue Has Not Been Briefed or Argued.* In our brief on the merits in this case we did note the possible existence of a constitutional question as to whether, consistent with the provisions of Article III of the Constitution, Congress could grant jurisdiction to the Federal courts over suits for breach of collective agreements without creating a federal substantive law governing such suits. We did not, however, argue this constitutional issue because both parties accepted the view of the court below that federal law governed the substantive rights of the parties in suits brought under Section 301. Counsel for the respondent also noted the existence of a constitutional issue under Article III but also assumed that Congress intended to create a federal substantive right. As stated by counsel, "he

only need argue that any federal substantive right which might have been created by Congress cannot encompass the claim asserted by petitioner." (Respondent's Brief, p. 38).

The opinion of Mr. Justice Frankfurter, in which Justices Burton and Minton concurred, thus rests on an express desire to avoid a constitutional difficulty which has been neither briefed nor argued by counsel in this case because both counsel adopted a premise, deemed unacceptable by these Justices, that Congress intended to create a federal substantive law for suits brought under Section 301. It would be entirely proper and, we believe, desirable to order that this case be reargued so that counsel can present argument on this constitutional issue. Indeed, if constitutional doubts are to be given a controlling, or even persuasive, effect on the interpretation to be given Section 301, it is respectfully suggested that it would not be inappropriate to invite the Solicitor General of the United States to submit his views to the court in accordance with provisions of 28 U.S.C. § 2403.

2. *The Opinion of Mr. Justice Frankfurter.* The opinion of Mr. Justice Frankfurter, with which Mr. Justice Burton and Mr. Justice Minton joined, contains within itself two conflicting interpretations of the meaning of Section 301. In its early portions the opinion appears to say that all Section 301 does is to give "procedural directions to the federal courts." (Slip Sheet Op., p. 5, p. 11). As Mr. Justice Frankfurter phrased the Congressional intention, the district judges were simply told that when a union appeared in a case involving breach of a collective agreement, it should be treated "as though it were a natural or corporate legal person."

If this language means what it appears to mean, Section 301 is deprived of its character as a grant of jurisdiction. Its only effect is to give unions a capacity to sue and be sued in cases, involving collective agreements, in which federal

jurisdiction can be found independently of the provisions of Section 301.

Almost all of the opinion is consistent with this apparent construction of the statute. Indeed, most of the argumentation in the opinion rests on this construction.

Thus, the opinion—as we understand it—rejects the view that Congress intended a federal substantive law to govern in suits brought under Section 301. But it then proceeds to point out that a serious question of constitutionality would arise from the grant of jurisdiction to federal courts over a contract governed entirely by state law (pp. 12-14). And it concludes, after again rejecting the possibility that Section 301 should be treated as substantive legislation (pp. 14-21), that the serious constitutional problem may, and indeed must, be avoided through "the orthodox process of limiting the scope of doubtful legislation." (p. 21.)

If the statute is construed as not being a grant of jurisdiction at all so that its only effect is to give unions the capacity to sue and be sued on their contracts where federal jurisdiction otherwise appears, the argument supports the conclusion. A bare grant of federal jurisdiction in the absence of diversity would pose serious constitutional questions. To avoid this question, the courts can either read a federal substantive law into the statute, or can read the statute as not being a jurisdictional grant at all. For the reasons stated, the opinion prefers the latter result, hence Section 301 is construed as not giving jurisdiction in any case where federal jurisdiction is not otherwise present.

If the opinion clearly reached this result, we might disagree both as to the premises and as to the conclusion, but at least we could understand—and the lower federal courts could understand—how Section 301 has been construed.

Unfortunately, however, the opinion, which begins with this construction of Section 301, ends with the conclusion that the section must be read as not giving jurisdiction to the federal courts in cases "based upon an employer's failure

to comply with terms of a collective agreement relating to compensation." It appears to be assumed, in the concluding discussion on pp. 22-23 of the opinion, that Section 301 *is* a grant of Federal jurisdiction—but not for suits by unions to recover compensation for individual employees.

This construction not only seems to contradict the specific construction spelled out in quotation marks on page 5 of the opinion. It also seems to make irrelevant almost all of the argument on the preceding 20 pages. If Section 301 *is* a grant of Federal jurisdiction, then no constitutional problems have been avoided "through the orthodox process of limiting the scope of doubtful legislation."

The constitutional problem presented when a union sues a company under Section 301 is no greater than when a company sues a union. It does not avoid any constitutional issue to construe the statute as permitting companies to sue unions but not as permitting unions to sue companies. Nor does it fairly eliminate "opportunities for forum-shopping" to say that this shopping is to be restricted to employers.

Furthermore, if, as the opinion says, the applicable substantive law is state law and if state law recognizes a right in the union, it is impossible to read the language of Section 301 as granting Federal jurisdiction but excluding it in this case. "Suits for violations of contracts between an employer and a labor organization" the statute says, may be brought in the District Courts. If we are to look to Pennsylvania law to find out what a contract between an employer and a labor organization is, and who has substantive rights in it, then we must assume here that there is a contract between this employer and this labor organization, that it does govern the compensation of employees, that the labor organization has a substantive interest in its performance, and that this interest is enforceable by a suit at law. This interest is the same, under state law, as the union's interest in the check-off or any obligation of the employer not involving benefits to the employee. (See *infra*, p. 12). We

know of no way in which, if state law is applicable, this suit can be distinguished from any other suit by a union. And we know of no way in which the Congressional language can be construed as giving the federal courts jurisdiction over suits for breach of collective agreements but only where the employer is suing.

We concede that "nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here." Indeed, we go further. Nowhere in the legislative history is there any indication that Congress believed that employers ever violated collective agreements. There is no recognition, in the Congressional discussion, of this type of suit or of *any* type of suit brought by a union.

But, surely even the 80th Congress could not have passed —and did not pass—a statute which permitted only employers to sue on collective agreements. Believing, as it did, that only unions violated collective bargaining agreements, Congress was willing to be "fair" and allow suits by either party to such agreements. The fact that, after seven years, one case in which a union brought suit on a collective agreement has reached this Court, should not persuade the Court that it is necessary to deprive the unions of the balance which Congress provided in order to close "the doors of the federal courts to a potential flood of grievances." [1]

For all of these reasons we believe that, of the two constructions of Section 301 contained in the opinion of Mr. Justice Frankfurter, the one set forth clearly on page 5 is more sensible than the one which appears to be intended on pp. 21-22. We prefer to think that the former is the intended construction. But, we submit, it would be far better if the matter were settled by a new or amended opinion,

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[1] That there is no such "potential flood" is shown by the fact that in seven years, only approximately 37 reported cases were brought by unions under Section 301. The reason, of course, is that about 90% of all collective agreements provide for final and binding arbitration of grievances. See Brief For Petitioner, pp. 47, 64, and authorities there cited.

after reargument in which all of the considerations could fully be argued by both parties.

3. *The Opinions of the Chief Justice and Mr. Justice Reed.* The opinion of the Chief Justice, which Mr. Justice Clark joined, avoids discussion of both the constitutional issue discussed by Mr. Justice Frankfurter and the question of the applicable substantive law in suits brought under Section 301. The opinion says simply that neither the language nor the history of Section 301 indicates that Congress intended a union to be able to bring a suit such as this one. The opinion of Mr. Justice Reed discusses the constitutional issues but comes to substantially the same conclusion.

In both opinions, this suit is thought not to be within the scope of Section 301 because, in the Chief Justice's words, it is brought by the union to enforce "the uniquely personal right of an employee for whom it bargained to receive compensation for services rendered his employer."

But even if we assume, in accordance with these opinions, that Congress did not intend to authorize a union to sue to enforce the personal rights of the employees, there still remains in this case the question as to whether the union can sue here to enforce *its* rights in the contract which it nas made.

For the reasons which we set forth in our brief, we do not believe it is proper to separate the union's interest in the performance of a collective agreement for the employees' interest. But, if we accept the separation, and if we exclude the individual's interest in the particular wages due him from the scope of the statute, the complaint here still comes within the statute.

The union here asked for two kinds of relief. It asked the court to decide that the company had adopted a rule, which it applied so as to reduce the compensation of more than 4,000 employees, which violated the terms of the contract as to salaries between the company and the union.

It also asked the Court to order an accounting by the company as to the amounts wrongfully so deducted and to issue judgment in favor of the individual employees for such amounts. (R. 7.)

We here assume, with the Chief Justice, Mr. Justice Clark, and Mr. Justice Reed, that the union could not properly ask for the latter relief under Section 301. But what of the union's claim for declaratory relief that the company had adopted a rule, applicable in general to all employees, which is contrary to the terms of the promise which the company made to the union?

The union here asked for an adjudication of the meaning of the contract which the union, and not any employee, has negotiated with the company. The claimed violation of the agreement had nothing to do with the services rendered by any particular employee. To the contrary, the union claimed that the employer had agreed with it to pay all of the employees on a salary basis and not to make deductions from that salary on an hourly basis, for time lost. It claimed that this had been the prior interpretation and application of the agreement. It claimed that the company changed the rule, in violation of the agreement, and made deductions, on a uniform basis, from the salaries of 4,000 employees. It sued not only to enforce the "uniquely personal" rights of these 4,000 employees, but also to enforce the company's promise to the union that it would pay all employees on a salary basis and would "administer the provisions of this Agreement in good faith." (R. 9.)

Put in another way, the matter comes down to this. The claim for declaratory relief does not involve any dispute as to the salary rate at which any particular employee is to be paid. It does not involve any dispute as to the amount which was paid to any particular employee or as to the deductions which were made by the Company. It involves only one dispute: whether, under the terms of the collective agreement, the Company has the right to impose

a general rule that all employees who lose time shall have hourly deductions made from their monthly salaries. The action of the company was not taken with respect to a particular employee and it was not claimed that particular employees have uniquely personal reasons for protesting the action. The only question presented is whether the company has adopted a practice, with respect to all of the employees, which violates its contractual agreement with the union.

It is possible, of course, that if this case goes to trial, individual differences and issues may develop. And, if they do, the view of the Chief Justice and Mr. Justice Clark would perhaps be that the adjudication of these "uniquely personal rights" would not be within the scope of the action permitted by Section 301. But the union has asked here, not only for payment to the individuals, but also for declaratory relief as whether the Company, in making deductions from salaries, is in violation of its agreement with the union. There is nothing personal about that kind of relief. And, we submit, there is nothing in the Congressional language, history or discussion which would indicate that such relief is to be excluded from the scope of the statute.

We have already adverted to the legislative language and history (*supra*, p. 7). Omitting all subtleties and sophistications, it is crystal clear, and not subject to any doubt, that Congress intended *both* unions and employers to be able to sue under Section 301. The statute says so. The House committee report says so.[2] The Senate committee report says so.[3] The Conference committee report says so.[4]

It is also clear that Congress' attention was focussed ex-

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[2] ". . . Actions and proceedings involving violations of contracts between employer and labor organizations may be brought *by either party* . . ." (House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 46-47 (emphasis added)).

[3] "The Committee bill makes collective bargaining contracts equally binding, and enforceable *on both parties.*" Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 14 (emphasis added).

[4] House Conf. Rept. No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 65-66.

clusively on cases in which unions had violated collective agreements. The motivating force behind the Congressional action, without doubt, was the desire to have judgments rendered against unions for such violations, and the assumed difficulty of obtaining those judgments in the state courts. But, whatever the motive for the legislation, it was clearly the intention that the statute should permit both sides to sue. Concededly, because the attention of Congress was exclusively on cases in which unions violated their agreements, there was no indication of what particular kind of suit by a union was meant to be included. The intention simply was to balance the grant of jurisdiction over suits *against* unions with a similar grant of jurisdiction over suits *by* unions.

If the declaratory relief requested here is to be denied to unions then the Court is, in substance, rewriting the statute to provide only that employers can sue in the federal courts. Unions exist for the purpose of negotiating contracts with employers that specify the rules governing the payment of wages, hours and working conditions to employees. If a union cannot prosecute, under Section 301, a claim that an employer has misconstrued such a contract and, pursuant to that misconstruction, imposed a rule in violation of the contract, then the Congressional grant of jurisdiction over suits on collective agreements both against and by unions is rendered a fraud. For all substantial purposes the statute is rewritten as authorizing suits only against unions.

4. *The Pennsylvania Law Was Not Before the Court.* Because *both* parties accepted the premise of the Court of Appeals that federal law governed any actions brought under Section 301, the substantive law of Pennsylvania and its possible application in this suit was neither briefed nor argued. But the premise on which both counsel relied is incorrect, or only partially correct, as we understand the views of at least four of the Justices concurring in the affirmance here. Under these circumstances, it would seem

to us that the law of Pennsylvania is a relevant consideration. The Court either should have the applicable Pennsylvania law before it in making its decision or should remand the case to the Court of Appeals for consideration of that law.

We think that examination of the law of Pennsylvania with respect to collective bargaining agreements will establish without doubt that unions are regarded by the Pennsylvania courts as having a substantive legal interest in the performance by the employer of this agreement with the union to pay wages, salaries, and other benefits to the employees. Indeed, prior to 1933 *only* the union was regarded as having a right to enforce what the Chief Justice here has called "the uniquely personal right of an employee." [5]

If, as Mr. Justice Reed says, a considerable amount of state law may be applied in suits under Section 301, certainly argument should be heard by the court on the question as to whether in the present case state law does not create a substantive right in the union with respect to the performance by the employer of his agreement with the union to pay wages and salaries to employees in accordance with the terms of the collective agreement.

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[5] Thus, in *Babbitt* v. *Wilmer & Vincent, Inc.*, 14 Lehigh County L. J. 97 (1930) an employee was denied the right to sue to obtain wages lost by a discharge claimed to be in violation of a collective agreement. The court agreed that collective bargaining agreements were enforceable agreements. "They possess every ingredient of a contract," it said. But the employee could not sue because he was a third party beneficiary and, in Pennsylvania, only the contracting party, not the third party beneficiary, could sue on such a contract. Subsequently in *Roberts* v. *Penn Tobacco Co.*, 34 Luzerne Leg. Reg. 237 (1939) a similar employee suit was sustained solely because the Supreme Court of Pennsylvania had, in the interim, reversed its position as to the rights of third party beneficiaries. *Commonwealth* v. *Great American Indemnity Co.*, 312 Pa. 183, 167 Atl. 793 (1933). In *Yost* v. *Finch*, 32 Berks C. L. J. 68 (1939) a suit in equity by a union to determine whether the employer was liable under a collective bargaining agreement to six discharged employees was permitted to be maintained. See also *United Mine Workers* v. *Monheim*, 11 Fayette Legal Journal 17 (1947) (vacation pay); *Chernko* v. *Moore*, 64 D. & C. 638 (1948) (employee permitted to sue as donee beneficiary); *Joint Board, Waist & Dressmakers Union* v. *Rosinski*, 177 Pa. Super. 303 98 A. 2nd 447 (1953); *Arbechesky Unemployment Compensation Case*, 174 Pa. Super. 217, 223, 100 A. 2nd 396 (1953).

If, as Mr. Justice Frankfurter says, state and not federal law is to "identify the nature of the legal relations created by a collective contract" (p. 17) and if § 301 is to be read as a grant of jurisdiction over suits for breach of such contracts, certainly the Pennsylvania law should be considered in determining whether this suit is a suit for breach of contract.

5. *The presence of a full court on reargument.* Nothing additional need be said about the fifth ground set forth for rehearing. The possibility that reconsideration of the questions in this case by the eight Justices who participated in the decision will lead to a clarification of the Court's position as to the meaning of Section 301 is obviously enhanced by the presence of an additional Justice who can add his weight to the collective consideration of the Court.

The Court has itself recognized the value of a full bench by postponing argument in a number of difficult cases. The fact that the difficulties in resolving the issue in this case became apparent after argument should, we submit, justify reargument before a full bench.

CONCLUSION AND CERTIFICATE

For the reasons above set forth, it is respectfully requested that this Court restore this case to the docket and order reargument. In accordance with Rule 58 counsel certify that this petition is presented in good faith and not for delay.

Respectfully submitted,

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